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LAW OFFICES

JENNER & BLOCK

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

601 THIRTEENTH STREET, N. W.
TWELFTH FLOOR
WASHINGTON, D. C. 20005

(202) 639-6000
(202) 639-6066 FAX

DIRECT DIAL NUMBER:

CHICAGO OFFICE
ONE IBM PLAZA
CHICAGO, IL 60611
(312) 222-9350
(312) 527-0484 FAX

MIAMI OFFICE
ONE BISCAYNE TOWER
MIAMI, FL 33131
(305) 530-3535
(305) 530-0008 FAX

LAKE FOREST OFFICE
ONE WESTMINSTER PLACE
LAKE FOREST, IL 60045
(708) 295-9200
(708) 295-7810 FAX

JODIE KELLEY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 13, 1997

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MCI's Motion for Stay Pending Judicial Review

Dear Mr. Caton:

Enclosed for filing please find an original and four copies of MCI's Motion for Stay Pending Judicial Review. Also enclosed is an extra copy to be file-stamped and returned.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Jodie Kelley

Jodie L. Kelley

No. of Copies rec'd 0+4

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NOV 13 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket 96-128

MOTION FOR STAY PENDING JUDICIAL REVIEW

Mary J. Sisak
Mary L. Brown
MCI Telecommunications Corp.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 872-1600

Donald B. Verrilli, Jr.
John B. Morris, Jr.
Jodie L. Kelley
Jenner & Block
601 13th St., N.W.
Washington, D.C. 20005
202-639-6000

Dated: November 13, 1997

SUMMARY

MCI Telecommunications Corporation hereby moves, pursuant to Section 416(b) of the Communications Act of 1934 and 5 U.S.C. § 705, for a stay pending judicial review of the Second Report and Order, adopted October 9, 1997, and published October 30, 1997 at 62 Fed. Reg. 58,659 (the "Order" or "Second Report and Order").[*/] MCI filed a petition for review of the Order with the United States Court of Appeals for the D.C. Circuit on November 7, 1997.[**/]

The Order is arbitrary and capricious, and should be stayed, for at least three reasons. First, as with the first order that preceded it, the Second Report and Order wholly "fail[s] to justify tying the default rate to local coin rates," but instead simply re-adopts without further discussion the "market rate" analysis questioned by the D.C. Circuit. Second, the Order's mixing of rates and costs is conceptually flawed and is in any event implemented in a faulty manner. Third, the Order relies on inadequate, unsupported, and flawed data to reach the cost factor used in its calculations, and as a result the Order sets a compensation rate significantly higher than appropriate.

---

*/ At a minimum, for reasons set out more fully below, the Commission should grant a stay until the expiration of any waiver of regulations implementing the Order, including but not limited to the waiver that the Common Carrier Bureau granted, on its own motion, on October 7, 1997, as noticed on October 30, 1997, 62 Fed. Reg. 58,686 (the "Waiver"). Order, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, F.C.C. DA 97-2162, at ¶¶ 8-9 (Oct. 7, 1997).

**/ Pursuant to 47 C.F.R. § 1.45(d), parties have seven days to comment on this motion. If no action is taken by November 24, 1997, MCI will deem that a denial of its stay request, and will seek a stay from the Court of Appeals.

Any one of these reasons is grounds to stay, and ultimately overturn, the Order.

Moreover, the existence of the Common Carrier Bureau's waiver of requirements that certain payphone providers provide the coding necessary for blocking makes a stay all the more necessary. Under the Commission's analysis, the _only_ means by which an IXC can avoid the unjustifiably high default compensation rate set by the Second Report and Order is the use of blocking. Yet in its Waiver Order, the Bureau takes away this blocking capability for a period of at least five months. The inability to block calls and thereby avoid the excessive compensation rate destroys the very theory on which the Commission based its "market" approach.

The balance of equities also favors the grant of a stay. The excessive compensation rate, especially when coupled with the inability to block calls caused by the Waiver, directly and irreparably harms both IXCs and their toll free customers, as well as the public at large. By contrast, a stay would cause _no_ harm to PSPs. These factors, coupled with a very high likelihood of success on the merits, warrant the grant of a stay.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone	)	
Reclassification and Compensation	)	CC Docket 96-128
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	

MOTION FOR STAY PENDING JUDICIAL REVIEW

MCI Telecommunications Corporation hereby moves, pursuant to Section 416(b) of the Communications Act of 1934 and 5 U.S.C. § 705, for a stay pending judicial review of the Second Report and Order, adopted and released October 9, 1997, and published October 30, 1997 at 62 Fed. Reg. 58,659 (the "Order" or "Second Report and Order"). MCI filed a petition for review of the Order with the United States Court of Appeals for the D.C. Circuit on November 7, 1997.

INTRODUCTION

In Section 276 of the Telecommunications Act of 1996, Congress directed the Commission to establish, within nine months, mechanisms that ensure that payphone service providers (PSPs) "are fairly compensated for each and every completed intrastate and interstate call using their payphone." 47 U.S.C. § 276(b)(1)(A). In response, on September 20, 1996, the Commission released its Payphone Order which, among other things, provided that for each 800 and access code call made from a PSP's payphone, that PSP would receive an amount equal to the market rate for payphone calls. That market rate, the Commission concluded, was 35¢. The Commission issued an Order on Reconsideration on November 8, 1996.

A number of parties challenged the Commission's Payphone Order and, on July 1, 1997, the United States Court of Appeals for the District of Columbia Circuit vacated those portions of the original order and the order on reconsideration that set "the compensation that the IXCs must pay to payphone service providers for subscriber 800 and access code calls, both prescriptively during the interim period and as the default rate thereafter." Illinois Pub. Tel. Ass'n v. FCC, 123 F.3d 693, 693 (D.C. Cir. 1997) (clarifying the effect of the Circuit's July 1, 1997, judgment).

In response, the Commission set another comment cycle and issued two orders relevant to this Motion for Stay. On October 7, 1997, the Common Carrier Bureau waived, until March 9, 1998, the requirement that PSPs provide the payphone-specific coding digits from their payphones that would be required for IXCs to block calls from payphones. Two days later, on October 9, 1997, the Commission issued the Second Report and Order -- the subject of this stay petition. In the Second Report and Order, the Commission readopted with minor modification its earlier Payphone Order. That Order also expressly relied upon the assumption that interexchange carriers have the power to block calls made from high-rate payphones -- an assumption which, because of the Bureau's Waiver Order, was simply incorrect.

On November 7, 1997, MCI filed a petition for review of the Second Report and Order with the D.C. Circuit. MCI now requests the Commission to stay implementation of the compensation scheme adopted by the Second Report and Order until the D.C. Circuit has ruled on the merits of MCI's petition.[1/]

STANDARD

Under the familiar test to determine whether an order should be stayed pending review, a stay should be granted where (1) the movant is likely to prevail on the merits of the appeal; (2) the movant will likely suffer irreparable harm absent a stay; (3) others will not be harmed if a stay is issued; and (4) the public interest will not be harmed. See In Re Deferral of Licensing of MTA Commercial Broadband PCS, 61 Fed. Reg. 19623 (May 2, 1996) (citing Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977)).

[1/] Pursuant to 47 C.F.R. § 1.45(d), parties have seven days to comment on this motion. If no action is taken by November 24, 1997, MCI will deem that a denial of its stay request, and will seek a stay from the Court of Appeals.

"The test is a flexible one." Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Relief should be granted if a movant demonstrates "either a high likelihood of success and some injury, or vice versa." Id. (citing Cuomo v. United States Nuclear Regulatory Comm'n, 772 F.2d 972, 974 (D.C. Cir. 1985)). An "absolute certainty of success" on the merits is not required. Id. Indeed, a stay should issue "even though [the Court's] approach may be contrary to movant's view on the merits," as long as the movant makes a substantial showing on the other factors. Washington Metro. Transit, 559 F.2d at 843.

MCI will demonstrate that it is likely to prevail on the merits, that it will suffer irreparable harm if the Second Report and Order is not stayed, and that the public interest strongly supports a stay. These factors warrant a stay pending judicial review.

I. MCI IS LIKELY TO PREVAIL ON THE MERITS.

In its decision rejecting the first order in this proceeding, the D.C. Circuit -- using terms such as "inexplicable" -- attacked the Commission's unexplained reliance on a default rate tied to a local coin rate as the basis for "fair compensation" to PSPs. See Illinois Pub. Tel. Ass'n v. FCC, 117 F.3d 555, 564 (D.C. Cir. 1997). In its order on a motion for clarification, the Court made expressly clear that the Commission's decision on this issue was "vacated," and that the Court thought there was "little or no prospect of the rule's being readopted upon the basis of a more adequate explanation of the agency's reasoning." Illinois Pub. Tel. Ass'n v. FCC, 123

F.3d 693, 693 (D.C. Cir. 1997). Yet that is precisely what the Commission is trying to accomplish -- the essential readoption of its original order with minor modifications and little or no additional explanation. For the reasons set out below, among others, the D.C. Circuit is very likely to conclude that the Second Report and Order is as flawed -- and as arbitrary and capricious -- as the first.

A. The Commission Wholly Fails to "Justify Tying the Default [Compensation] Rate to Local Coin Rates."

In rejecting the Commission's payphone compensation scheme, the D.C. Circuit stated that the "critical point here is that the FCC has failed to justify tying the default [per call compensation] rate to local coin rates." Illinois Pub. Tel. Ass'n, 117 F.3d at 564.

As the Commission acknowledged, the D.C. Circuit "concluded that the adoption of the default rate without further explanation was arbitrary and capricious." Second Report and Order ¶ 23. In response, the only supplemental analysis offered by the Commission consisted of (a) the conclusion that the D.C. Circuit decision did not prohibit the market rate approach, id., (b) the statutory language did not prohibit the approach, id. ¶ 24, and (c) none of the comments submitted on remand persuaded the Commission to change its mind on the market rate approach, id. The Commission then readopted the same approach based on "the reasons stated" in the original Payphone Orders. Id. In light of the Commission's failure to offer any additional justification for "tying the default [per call compensation] rate to local coin rates," there is a very significant likelihood that the Court will again conclude that the Commission's unexplained and "inexplicable" tying of the default rate to the local coin rate is arbitrary and capricious. See, e.g., ALLTEL Corp. v. FCC, 838 F.2d 551, 558 (D.C. Cir. 1988) (noting that "[s]oftening an arbitrary and capricious rule does not necessarily cure it"); Action on Smoking and Health v. Civil Aeronautics Bd., 713 F.2d 795, 798-99 (D.C. Cir. 1983) (holding that an "agency cannot remedy a deficiency in one regulation by promulgating a new rule, equally defective for the same or other reasons") (footnote omitted).

Moreover, for numerous reasons, the tying of the default rate to the local coin rate cannot be rationally justified. First, the market rate approach assumes, without foundation and contrary to the record, that the market for local coin payphone calling is the same market that exists for access or long distance calling from payphones. Second, the market rate approach assumes, without foundation, that the local coin rate effectively reflects a negotiated rate between equally powerful market participants. Third, the market rate approach assumes, without foundation or analysis, that a payphone service provider should obtain the same amount of profit from an IXC or toll free subscriber (either of whom has no control over the decision to use a payphone) as the PSP obtains from a local payphone user (who has complete control over the decision to use a payphone). The Commission utterly failed to address, or, at best glossed over, these fundamental flaws in its market rate approach. See, e.g., ALLTEL, 838 F.2d at 558 (finding that "the Commission must do more than simply ignore comments that challenge its assumptions and must come forward with some explanation that its view is based on reasonable analysis"); Action on Smoking and Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1217 (D.C. Cir. 1983) (rejecting the agency's suggestion that "as long as the record contains evidence explaining its conclusion, it need not explain its action," and holding that in "order to uphold the agency's action, it must be shown that the" agency "rationally considered the relevant evidence").

B. The Subtraction of Costs from a Market Rate is Irrational, Arbitrary and Capricious.

In the Second Report and Order, the Commission offers no conceptual justification for subtracting from a "market rate" the avoided "costs" to determine an appropriate compensation rate. This subtraction of apples from oranges cannot be justified. Cf. Air Line Pilots Ass'n v. FAA, 3 F.3d 449, 453 (D.C. Cir. 1993) (holding that decision-making that is "internally inconsistent" is "unreasonable and impermissible").

The defect in this apples and oranges approach is illustrated by analyzing the components of the $.35 per call "market rate" that the Commission uses as a starting point for determining fair compensation. The $.35 rate inherently contains two basic parts: the cost of providing the service, and a profit element. From that cost+profit figure, the Commission has subtracted a 6.6 cent cost figure. The resulting 28.4 cent figure, therefore, contains a component of cost (full cost minus

6.6 cents) plus full profit (including profit on the 6.6 cents that were subtracted). In other words, without any analysis or foundation, the Commission's "market rate-minus-cost" approach gives PSPs a "superprofit" on access and toll free calls.[2/] This "superprofit" is not, and cannot be, an appropriate element of "fair compensation" to PSPs. It is an open question what profit element, if any, is appropriately included in "fair compensation," but a profit rate in excess of the PSPs' profit rate for local coin calls certainly cannot be justified.

This profit issue illustrates the broader problem with mixing "market rate" and costs into a single calculation. The Commission arbitrarily and capriciously adopted this mix without addressing the conceptual issues raised by it.

[2/] An example illustrates the "superprofit" that PSPs receive under the Second Report and Order. Using the New England Telephone actual cost figure of 16.7 cents per call and the Commission's 6.6 cent cost reduction, the "market rate" approach works as follows:

For local coin calls:	cost	= 16.7 cents
	rate	= 35 cents
	profit	= 18.3 cents or 210% profit rate
For non-coin calls:	cost	= 10.1 cents
	rate	= 28.4 cents
	profit	= 18.3 cents or 281% profit rate

Entirely apart from the question whether the 210% profit rate is appropriate in the first place, there is no justification for the over 280% profit taken from IXCs under the Second Report and Order.

C. The Commission Relied on Incomplete, Inadequate, and Flawed Record Evidence.

In the Second Report and Order, the Commission calculated "marginal payphone" figures from which costs borne by the IXCs are extrapolated. The Commission (citing its earlier order on reconsideration) determined that the marginal payphone figure is the appropriate model because to do otherwise might lead to a reduction in the number of payphones deployed. See Second Report & Order ¶ 93. This analysis is simply wrong. Regardless of the charge ultimately set by the Commission, PSPs will have the ability to: collect "0+" commission revenues; increase local coin rates to whatever the market will bear; and recover for the first time substantial compensation for originating both subscriber 800 calls and intrastate access code calls. This will not reduce the number of payphones; instead it will necessarily increase PSPs' revenues from each existing payphone.

Even if the "marginal payphone" figures have some normative validity, the Commission derived its crucial figures for such marginal payphones from severely limited data provided by the American Public Communications Council ("APCC"). See Second Report and Order ¶ 48. This data consisted of "average cost per payphone; average commissions paid to premises owners per payphone; average number of calls per payphone; the marginal cost per coin call; and breakdown of average call types per payphone." Id. ¶ 49 n.124. Based on this data, the Commission calculated the cost and profit structures of, and the number of calls that are made from, a hypothetical low traffic location payphone. See id. ¶¶ 47-50.

The Commission adopted the APCC data purportedly "because these data are representative of the payphone industry as a whole." Id. ¶ 48. The Commission noted that other commenters had submitted similar call-type data, i.e., the ratio of coin calls to coinless calls, but only compared the APCC data (other than call-type data) with the data submitted by Communications Central, Inc. ("CCI"). See id. ¶ 49 n.124. APCC is a trade group for independent PSPs, and CCI is itself an independent PSP. Therefore, the Commission's data only considered independent PSPs, and thus completely failed to examine data from any local exchange carriers ("LECs"). This exclusion of LEC data is unjustifiable.

The LECs dominate the payphone industry -- operating the vast majority of all payphones. See Second Report & Order at ¶ 60 (noting that "[m]ost payphones . . . are owned by large local exchange carriers"); see also Report & Order, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 F.C.C.R. 20,541, at ¶ 9 (adopted Sept. 20, 1996). APCC's data, and hence the Commission's data, are therefore based on cost figures representative of -- at most -- one quarter of payphones.

Failing to include LEC-based data plainly skewed the results. New England Telephone, for example, filed a per-call local coin cost of $0.167 with the Massachusetts DPU, see Second Report and Order ¶ 70, significantly lower than APCC's cost per-call local coin cost of $0.435.[3] See id. ¶ 49. The Commission simply ignored this discrepancy -- as it ignored Sprint's data that showed its actual costs to be $100 per payphone per month, compared to APCC's $242 per payphone per month. The Commission's failure to address the most probative evidence in the record and resulting failure to accurately determine the industry cost and profit structures fatally skewed the results.[4]

Because the Commission's order will not survive judicial review unless the Commission "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Life Ins. Co., 463 U.S. 29, 43 (1983) (quotation omitted); accord MCI Tel. Corp. v. FCC, 842 F.2d 1296, 1300 (D.C. Cir. 1988), this Order will be overturned. No such rational connection exists. Indeed, the Commission did not even try to construct one in its Second Report and Order. Instead the Commission blithely said that the APCC data were the "most thorough and representative." Second Report and Order at ¶ 49 n.124. It was this kind of unreasoned decisionmaking that caused the D.C. Circuit to strike down the first order. The Commission's second order will fare no better. See Illinois Public Tel. Ass'n v. FCC, 117 F.3d at 564

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[3] Moreover, this $0.167 cost includes a profit equal to "a reasonable return on" New England Telephone's "investment capital." Mountain States Tel. & Tel. Co. v. FCC, 939 F.2d 1035, 1038 (D.C. Cir. 1991). Therefore, the true cost is even less.

[4] To the extent the LECs provided less data than the independent PSPs -- precisely because the LECs would not want their lower costs to become used in the Commission's calculations -- the Commission may not reward the LECs for having done so.

("The FCC's ipse dixit conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.").

Furthermore, beyond the use of unrepresentative data, the Commission also failed to consider arguments challenging its use of the inefficient independent PSPs' costs to determine the costs of the "marginal payphone." The FCC ignored MCI's study challenging the Commission's premise that a higher per-call compensation rate would promote Congress's goal of widespread deployment of payphones. Cf. Second Report and Order ¶ 33. AT&T also challenged the Commission's premise. Nonetheless, the Commission did not respond to AT&T's argument that the market deals with the deployment of non-economic payphones through the mechanism of "semi-public" phones, which are supported by direct payments from location owners. And the Commission failed to address the argument that Congress manifested its intent in the statute by providing for "public interest payphones." See 47 U.S.C. § 276(b)(2).

Finally, the Second Report and Order is based on data submitted by supporters of the PSPs that is flawed. For instance, based on USTA figures, the Commission "assume[d] that $600 million of additional LEC investment would be recovered from increased payphone line rates." Second Report & Order at ¶ 57. During the course of the proceedings, MCI demonstrated that these figures were incorrect. See, e.g., Letter from Mary J. Sisak, Senior Counsel, MCI, to Michael K. Kellogg, counsel to LEC ANI Coalition (Sept. 30, 1997). The Order totally ignores this factual error, which USTA itself now admits. See Letter from Keith Townsend, Director of Regulatory Affairs & Counsel, United States Telephone Association ("USTA"), to John B. Muleta, Deputy Chief, Common Carrier Bureau (Oct. 24, 1997) ("USTA Letter"). Indeed, USTA estimates that the real cost may be one tenth of what the Commission accepted as accurate. See USTA Letter at 4. Thus, by relying on flawed data IXCs may bear charges that exceed by more than $500 million the costs of the LEC and PSP upgrades.[5] For all these reasons, the Second Report and Order is as arbitrary and capricious as the first, and MCI is highly likely to succeed on its challenge to the Order.

II. MCI AND OTHERS WOULD SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.

The costs associated with the FCC's payphone Order are very significant and to a large degree unquantifiable.[6] In the face of inappropriately high per-call charges, many customers will inevitably choose, to the extent possible, to have incoming calls blocked. Thus, fewer payphones will be available to originate 800 and access code calls, and carriers such as MCI will realize an unquantifiable but significant reduction in revenue that would otherwise be realized from those calls.

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[5] In addition, the Commission deducted too small a cost for local coin call completion. The record evidence shows that a proper amount should be 5 to 8 cents rather than the Commission's 2.5 to 3 cent figure. See Second Report and Order ¶ 54 & n.141.

[6] If the Order is not stayed, carriers will either absorb the inflated costs, or pass those costs on to their customers. Either choice causes carriers, and consumers, significant harm.

Although the economic burden of this order will negatively impact all carriers, it will have an especially detrimental impact on newer, smaller interexchange carriers. As the D.C. Circuit noted in Illinois Public Telephone, under the Commission's original scheme, the cost to small carriers would be as much as "$4 million per month." Illinois Pub. Tel. Ass'n, 117 F.3d at 565. The new Order decreases the cost slightly, but small carriers will still pay tens of millions of dollars per year. These small carriers may not have the resources to remain competitive in the face of these overcharges, and consequently may not even be in business when the Order is eventually overturned, and a new regime put in place.

Moreover, under the regime now in place, no carrier, large or small, has the ability to avoid these charges in their entirety. In its Order, the Commission found that carriers' ability to block calls from payphones obviates the negative economic impact of default rates by providing IXCs with leverage to negotiate lower rates. See Second Report and Order ¶ 97. Even if blocking did provide carriers with real leverage, and it does not, the ability to block is not in place now. Two days before the Commission issued its Second Report and Order, the Common Carrier Bureau issued an Order waiving the requirement that certain payphone operators provide the information necessary to implement blocking. Order, F.C.C. DA 97-2162 (Oct. 7, 1997), at ¶¶ 8-9. Under the Bureau Order, MCI and other IXCs must pay per-call compensation through March 9, 1998, for any payphones not able (as of October 7, 1997) to transmit the coding digits necessary for call blocking -- i.e., those payphones whose calls MCI cannot block. Id. ¶ 17. Because the mechanism on which the Commission expressly relies to move costs to a competitive level -- call blocking -- is not available to carriers at this time, it is apparent that, under the FCC's own logic, carriers have no ability at this time to negotiate reasonable rates or to otherwise alleviate the impacts of the Order.

In any event, blocking is not an economic panacea. As the D.C. Circuit recognized, blocking itself is expensive, and imposes costs when carriers block calls because the default rate is too high. Illinois Pub. Tel. Ass'n, 117 F.3d at 564. Moreover, as noted above, blocking itself harms interexchange carriers; the use of blocking "invariably will result in a mutual loss of business for *both* the PSPs and the IXCs." Id. Thus, as the D.C. Circuit recognized, unjustifiable default rates are not saved by a carrier's ability to block 800 and access code calls, even if that ability were in place now. Id.

III. NO OTHER PARTY WOULD BE HARMED BECAUSE A PROCEDURE ALREADY EXISTS THAT COULD REMEDY ANY HARM ARGUABLY CAUSED BY A STAY.

Not only would MCI be irreparably harmed in the absence of a stay, no other party would suffer any real harm if a stay were granted. Indeed, the only arguable harm that PSPs could point to if a stay were granted would be a delay in receiving compensation until judicial review is completed.[7] But, in sharp

---

[7] Any claim of harm to PSPs would be based on an assumption that the Order will eventually be upheld -- an assumption that, as demonstrated in Section I, is wholly unwarranted. If the (continued...)

contrast to the harm that interexchange carriers would suffer if a stay were not granted, the financial harm to PSPs would unquestionably be temporary.[8/] The FCC has already indicated that it intends to provide compensation to payphone providers for the period prior to October 7, 1997, and has instituted a proceeding for that purpose. <u>See</u> Public Notice § II(B)(4); <u>see also</u> Second Report and Order ¶ 4. Whatever the legal authority or merits of providing compensation for the pre-October 7, 1997, period, the FCC could in that proceeding set compensation to PSPs for the period <u>subsequent</u> to October 7, 1997.[9/] Thus, the cost to payphone providers of a stay would be <u>de minimis</u> at best. Indeed, because the cost of a stay would be minimal, and because MCI has demonstrated a strong likelihood of success on the merits, a stay is clearly warranted.

7/ (...continued)
Order is eventually overturned, then PSPs would have suffered no cognizable harm from the entry of a stay at this time.

8/ MCI firmly believes that, should it be forced to pay charges that are later determined to be higher than fair compensation, the Commission should devise a mechanism by which MCI can recover the overcharges. The Commission has not, however, indicated that it would do so. <u>See</u> Public Notice, Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding, F.C.C. DA 97-1673, at § II(B)(4) (Aug. 5, 1997) ("Public Notice").

9/ MCI plans to request an expedited briefing and hearing schedule at the Court of Appeals.

IV. THE PUBLIC INTEREST WEIGHS IN FAVOR OF GRANTING A STAY.

As noted above, carriers faced with paying exorbitant per call compensation charges face the choice of absorbing them, or passing them on to consumers. If they choose the latter,[10] consumers will unnecessarily pay more based on unjustifiably high charges. Any unnecessary increase in the cost of phone service is not in the public interest.

If a stay is granted, consumers will also benefit from increased choice. If a stay is not granted, 800 customers, and possibly carriers, faced with exorbitant per call compensation charges will almost certainly block -- to the extent they can do so -- calls made by consumers from high rate payphones. Thus, consumers will have available fewer phones from which they can make 800 and access code calls. A stay would reduce the possibility that consumers would face unnecessary blocking, and the resulting decreased choice, during the period the rates are being reviewed.

---

[10] Most carriers will inevitably choose to pass costs on to consumers.

CONCLUSION

For the reasons stated above, the Commission should grant a stay pending judicial review of its Second Report and Order.

Respectfully submitted,

Donald B. Verrilli, Jr.
John B. Morris, Jr.
Jodie L. Kelley
Jenner & Block
601 13th Street, N.W.
Washington, D.C. 20005
202-639-6000

COUNSEL FOR PETITIONER

Mary J. Sisak
Mary L. Brown
MCI Telecommunications Corp.
1801 Pennsylvania Ave.
Washington, D.C. 20006
(202) 872-1600

Dated: November 13, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1997, I caused a true and correct copy of the foregoing Motion for Stay Pending Judicial Review to be served by First Class United States Mail, postage pre-paid upon the following:

ITS
1919 M Street, NW
Room 214
Washington, DC 20054

Robert F. Aldrich
Albert H. Kramer
Dickstein, Shapiro, Morin & Oshinsky
2101 L Street, NW
Washington, DC 20037-1526

Joel I. Klein
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530

Robert B. Nicholson
Room 10540
U.S. Department of Justice
Antitrust Div., Appellate Section
601 D Street, NW
Patrick Henry Building
Washington, DC 20530

Robert J. Wiggers
Room 10528
U.S. Department of Justice
Antitrust Div., Appellate Section
601 D Street, NW
Patrick Henry Building
Washington, DC 20530

Genevieve Morelli
Competitive Telecommunications Assoc.
1900 M Street, NW
Suite 800
Washigngton, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW
Suite 701
Washington, DC 20006

Michael K. Kellogg
Kellogg, Huber, Hansen, Todd & Evans
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

Frank W. Krogh
Donald Joseph Elardo
MCI Telecommunications Corp.
1801 Pennsylvania Avneue, NW
Washington, DC 20006

Leon Marvin Kestenbaum
Harold Richard Juhnke
Jay Clark Keithley
Sprint Corporation
1850 M Street, NW
Suite 1100
Washington, DC 20036

Maureen E. Mahoney
Richard Paul Bress
Latham & Watkins
1001 Pennsylvania Avenue, NW, Suite 1300
Washington, DC 20004-2505

Elizabeth Ann Noel
Michael A. McRae
Office of the People's Counsel